IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

Central Division

In re BRIAN A. KITTS, Debtor.	BK Case No. 05-27158 JAB Chapter 7
J. KEVIN BIRD, Chapter 7 Trustee, Plaintiff, vs. WINTERFOX, LLC, Defendant.	Adversary Proceeding No. 06-02250

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DISTRICT OF UTAH

FULL TRANSCRIPT

MOTION TO MODIFY ORDER GRANTING MOTION TO EXTEND THE DISCOVERY DEADLINE AND DEADLINE FOR FILING DISPOSITIVE MOTIONS

JUNE 1, 2009

BEFORE THE HONORABLE JUDITH A. BOULDEN

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SALT LAKE CITY, UTAH, MONDAY, JUNE 1, 2009, 2:34 P.M.

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(Call to order of the Court.)

THE COURT: Would you call the calendar, please.

THE CLERK: This is in the matter of Bird v. Winterfox.

THE COURT: Would parties note their appearances.

MR. AFFLECK: Adam Affleck and Aaron Millar for Chapter 7 Trustee, Kevin Bird.

MR. JUBBER: Your Honor, Gary Jubber and Sara Bouley, Fabian & Clendenin, on behalf of the Defendant Winterfox LLC.

THE COURT: Counsel.

MR. AFFLECK: Good afternoon, Your Honor. The first matter on the Court's calendar is the Trustee's Motion essentially for a one-day extension of this Court's deadline to file the dispositive motions. The deadline was set for May 22nd. The extension is essentially stopped for the filing of a motion and memorandum which were filed on the 23rd.

The Trustee attempted to file a Motion For Extension of this deadline within the deadline of May 22nd, but failed to do so by one minute. So instead of the Good Cause standard under Rule 16(b)(4), Your Honor, I think that the applicable standard is probably Excusable Neglect. The Supreme Court in the Pioneer case vs. Brunswick case said that determination of Excusable Neglect for missing a deadline is, at bottom, an equitable one taking into account all relevant circumstances.

The Court outlined four different factors. One was the danger of prejudice. In this case, Your Honor, we would assert that there is none. Our motion and memorandum were filed on the 23rd. They were hand delivered on the next business day, which was Tuesday the 26th. The response time, based on that hand delivery, would be exactly the same as if it had been filed on the 22nd by ECF or by mail. The length of the delay is the second factor the Supreme Court looked at in Brunswick. The delay in this case has been less -- was less than 24 hours.

The reason for the delay is the third factor. These reasons are set forth in the declaration of Mr. Millar, and they indicate that the Trustee, in preparing this Motion For Summary Judgment, undertook the task of tracking $1.3 million in funds from the Winterfox loan into various accounts. That's step one. And step two was to determine for each of those checks, or each of the items that were tracked, what was the purpose of those. Was it a consumer purpose or a business purpose or some unknown purpose.

The Trustee worked diligently to get the documents through discovery to third-party banks, title companies. We had those documents by approximately the end of April.

About April 24th. After that the Trustee, through his counsel, had numerous meetings with Mr. Kitts and his wife to determine exactly, for each transaction, what it was for, what it was used for.

On the 22nd, Your Honor, the Trustee was still revising this declaration of Mr. Kitts and Mrs. Kitts and diligently worked to get that done within the deadline. There was recognition that probably it would be a tight squeeze to get it done by the 22nd. We asked for an extension. The extension was denied. Based on that denial, we tried even harder. We thought we could get it done by midnight that night and file it. We were not able to. In our ultimate draft of the declaration there were still things that Mr. and Mrs. Kitts desired to change. When that occurred, Your Honor, we filed the Motion For Extension. Unfortunately, even that was one minute late.

THE COURT: I'm sorry. So I'm getting the impression, then, that somewhere just prior to midnight Mr. and Mrs. Kitts read their declarations and wouldn't sign them. Is that what you're trying to convey?

MR. AFFLECK: That's correct, Your Honor. There were still some -- I wouldn't say errors, but things that they wanted to clarify which required redrafting or revision of the declaration and some revision of the Statement of Facts.

THE COURT: Now, when did that occur?

MR. AFFLECK: Between 10:00 and 11:30 on May 22nd, and 11:30 at night. When we realized the revisions would take us probably longer than the midnight deadline, we hurried up and drafted a Motion For Extension. Unfortunately, that was filed at 12:01. And that's why we are before the Court on an Excusable Neglect standard.

The fourth criteria described by the U.S. Supreme Court was good faith. Did the party act in good faith who is seeking an extension. We would assert, Your Honor, based on the factual assertions contained in Mr. Millar's declaration, it shows that the Trustee's counsel and the Trustee worked diligently to finish and file by the deadline. We attempted a stipulated extension. We inconvenienced the Debtor and his wife, very much so, to get it done because we took the deadline seriously. We filed a Motion For Extension when it became absolutely clear that we would just miss the deadline, and we filed the motion and the memorandum and the declarations the very next day.

THE COURT: Now, this was for a deadline that was an extension from the prior extension that the Court had granted?

MR. AFFLECK: Correct, Your Honor. What had happened is originally all deadlines had passed. Winterfox moved for an extension of the deadline to file a Motion For Summary Judgment early on in the case. Or in January. I shouldn't say early on. But that motion was granted, and the Court exercised its discretion to include an extension of some other dates; discovery and so forth. The parties endeavored to conduct discovery within the relatively short time period that the Court had given us. There were scheduling issues with deponents that necessitated a short extension of that -- of the Court's deadline on discovery and dispositive motions.

The parties actually stipulated to a June 5th deadline for filing dispositive motions, and the Court, I think in reviewing the calendar, determined that perhaps that deadline should be shorter and provided a May 22nd date. And I think that was probably the reason why Winterfox counsel was not comfortable just stipulating to an extension with the Trustee on this case.

But the good faith, Your Honor, I think which is the final category, is shown by the diligence of the Trustee in -- in getting this or, at least, attempting to get this matter done within the deadline set by the Court. We take the deadline set by the Court seriously, and we certainly put forth an effort. It wasn't just an effort on Friday night. It was an effort on Wednesday and Thursday and Friday night to finish off the details of what is a very complex, factual investigation as to what every dollar of this $1.3 million was spent for to show that it was a consumer purpose loan.

The fact that the motion has been -- was served by hand delivery on the 26th means that there are no deadlines that need to be extended. The response date for our motion is the same date as the response date for their motion that they filed on the 22nd earlier that night.

On these facts, Your Honor, we would ask the Court to exercise its discretion, as is permitted under Rule 9006 in the Brunswick case, to find that there's no prejudice to Winterfox by allowing the extension and that the interest of justice and official -- or efficient judicial administration of this case could be served by allowing a short extension. Thank you.

THE COURT: All right. Thank you. Mr. Jubber.

MR. JUBBER: Thank you, Your Honor. Mr. Affleck made reference to the motion that Winterfox filed. It was actually in January. Actually, I believe, late December, December 30th, if my memory serves me correctly, in which we asked for leave to file a Motion For Summary Judgment.

If I might, Your Honor, just to put that in some context, prior to the Court's receiving the assignment of this particular adversary proceeding, the matter was assigned to Judge Clark, and a final pre-trial conference was actually held in this adversary proceeding last Fall, I believe in October, at which time Judge Clark had ordered that the matter be set for trial on February 9th and 10th of this year. And with Judge Clark's retirement, I received a call from the Court late in December, sometime in December, asking if that could be postponed until April.

Upon recognizing that we would have a postponement of the trial date and believing that this matter was susceptible to adjudication on a summary judgment, I thought that it would be at least worthwhile to call to the Court's attention that -- of that fact, and ask for leave to file a Motion For Summary Judgment. It was in that context, with the postponement of the trial date to April, I thought that we could do summary judgments within that period of approximately three and a half -- three and a half months. It was in that context that that motion was filed.

And then there was a hearing held before Your Honor sometime mid January. I believe, actually, it was January 12th, I remember the date, which Ms. Bouley appeared because, frankly, Mr. Affleck and I were both out of town at that date on another matter and -- and at which time the Court set this particular scheduling order and -- and set a -- a brief scheduling by which this matter could be adjudicated.

Your Honor, with respect to the Excusable Neglect Plaintiff has now acknowledged as the applicable standard, we would submit that is a very high and rigorous standard and the Plaintiff has failed to meet it here. The declaration of Mr. Millar states that they were aware since January that, according to their view of the case at least, that they needed to compile these documents for an affidavit by the Debtor Mr. Kitts. They clearly have had the cooperation of Mr. and Mrs. Kitts through that -- throughout that entire process.

Furthermore, as Mr. Affleck has acknowledged this morning -- this afternoon, excuse me, they have had the documents no later than -- they had all the documents no later than April 24th because that's when they forwarded copies to Winterfox. So they've had ample time, Your Honor. Quick calculation, that's 28 days prior to the deadline for filing the Motion For Summary Judgment. They've had ample time to assemble those documents and do what was ever required to prepare a motion and meet the deadline.

Mr. Millar's declaration, we submit, does not support a finding of excusable neglect. Rather, in my judgment, it describes Counsel having waited too long, perhaps, or miscalculated or improperly planned how much time it would take to prepare and file a motion that they contemplated with the supporting memoranda and declarations. We submit that is not excusable neglect. That is simply Counsel not having left enough time to get the job done.

Mr. Millar states in his declaration that they began working on the motion after discovery was completed on May 8th. I would note that, in fact, they had the available documents even two weeks prior to that. Also, they would have -- they had everything -- they knew about the May 20 -- May 22nd deadline, certainly, by that date and, as I mentioned, they had the -- had the necessary documents. So there was nothing that prevented them from getting the job done within the -- within the time that was required other than the possible press of other work.

Counsel attempts to make something in its papers, and Mr. Affleck referred to it again a moment ago, the fact that they called our office on the afternoon of May 22nd and requested an extension and, as they put it, it was denied. First of all, Your Honor, as the Court well knows, it wasn't in Winterfox's power to either grant or deny such a request.

Furthermore, as Ms. Bouley points out in her affidavit, as she received a call, the request was actually a request to join in a stipulated motion to extend the time. The parties had already made a similar request of the Court for an extension of time and, as Mr. Affleck correctly noted, that included this June 5th date as a possible date for a dispositive motion deadline. It was on -- it was the date -- the May 22nd date was corrected by the Court. The Court selected that date and asserted that date in the -- in the Order.

So the May 22nd date was a date that the Court chose, and based upon that, Ms. Bouley felt uncomfortable moving joining in a motion, stipulated motion, that would have asked the Court again when, in fact, the extended date had already been tacitly denied by the Court having to find the date that was suggested by the parties. We submit, Your Honor, that that response was perfectly reasonable under the circumstances.

We are left, then, with the issue of whether the neglect was excusable. The cases we have cited in our objection, particularly the 10th Circuit Lang case, make it very clear, in our view, that failure to meet a deadline because of press of other work or business, which is essentially all that is described in Mr. Millar's declaration, does not constitute Excusable Neglect. Rather, the Court's -- other Courts have made that very abundantly clear. Mr. Millar's declaration describes the pressures associated with the practice of law, and how several people stayed up past midnight trying to get the job done. That still does not constitute Excusable Neglect.

In the Plaintiff's reply memorandum where he acknowledges that Excusable Neglect is the correct standard, he describes these factors that Mr. Affleck reviewed, the Pioneer factors, and how those factors should be in their -- in their reply brief argue -- they argue that it should be weighed equally. I think that's the suggestion that Mr. Affleck has made here this afternoon.

In fact, Your Honor, that is not how the factors are to be applied. We would call the Court's attention, and I have a copy for the Court, if I could pass it up to the Court's attention, the United States vs. Torres 372 F 3rd 1159. I have a copy for Counsel, Your Honor, and so if I could have leave --

THE COURT: All right.

MR. JUBBER: -- to pass that up.

THE COURT: All right.

MR. JUBBER: I have actually highlighted a section of this opinion, Your Honor, with the Court's indulgence. But this is a 2004 10th Circuit case. The 10th Circuit makes it very clear, we believe, this case's authority, that the Pioneer factors do not carry equal weight. Rather, the excuse given for the late filing "must have the greatest impact." The Court said that the fault is -- "The fault in the delay remains a very important factor, perhaps the most important factor, in determining whether the neglect was excusable."

Similarly, in the case cited by the Plaintiff Zoo vs. St. Francis Health Care, the Court said, "Control over the circumstances of the delay is a very important factor. Perhaps the most" -- or "the single factor in determining whether neglect is excusable." And that's 413 Fed Supp at 1242. Here Plaintiff had complete control over the circumstances of the delay. There's nothing in Mr. Millar's declaration to suggest otherwise.

Turning to the Torres case, Your Honor, the 10th Circuit found that the district court had, in fact, abused its discretion in finding Excusable Neglect, and this had to do with an appeal on a criminal matter that already had -- the attorney had referenced the wrong set of rules and missed the deadline for filing of an appeal. And the Court found that the district court had abused its discretion when it found that three of the Pioneer factors weighed in favor of such a finding of Excusable Neglect, but the most important factor, fault in the delay, did not.

Again, Your Honor, we would submit that Mr. Millar's declaration really describes nothing more than Counsel having thought that they could get the job done by a certain time only to learn later that they had waited too long and it turned out to be a bigger job than they, perhaps, thought. There's nothing that prevented them or even interfered with them meeting with that deadline which they clearly knew. And they had the documents well in advance, four weeks in advance. All the documents that they needed in order to be able to assemble that motion. Again, we submit that is not Excusable Neglect.

Your Honor, we would submit that the motion to modify, to basically extend this deadline should be denied and that the Plaintiff's Motion For Partial Summary Judgment should be found to be untimely and, thus, Winterfox not be required to respond to it. Thank you.

THE COURT: And are you asserting that there's any prejudice to you?

MR. JUBBER: Your Honor, in a one-day delay, no. We're not asserting any prejudice other than, obviously, we prefer not to have to respond to the motion -- the Motion For Summary Judgment. There's a cost and expense that would be associated with that that we would prefer to avoid.

THE COURT: All right. There's another matter that the before the calendar today too. Do you wish to argue that?

MR. JUBBER: May I ask Ms. Bouley to argue that, Your Honor?

THE COURT: All right.

MS. BOULEY: Thank you, Your Honor. Winterfox has also filed a motion to strike an amended complaint that was filed at 5:00 o'clock on May 22nd in this case. Again, the dispositive motion deadline. Since December of 2008 Winterfox's primary goal has been to get to a point where it could file a Motion For Summary Judgment on all of the Trustee's claims, and that's something that the Trustee's been aware of by virtue of the fact that we did, back in

December, file a motion to extend just the dispositive motion deadline in this case when the trial was continued to the April dates.

But the Court did extend the dispositive motion deadlines a couple of times, and the date was May 22nd. Winterfox did timely file its Motion For Summary Judgment on that date, but because of the Trustee's admitted neglect and inadvertence which resulted in the Trustee's Amended Complaint being filed at the close of business on that day, Winterfox was prevented from moving for summary judgment on all of the Trustee's claims.

At 5:00 o'clock on May 22nd, there was just no way that Winterfox could significantly retool its Motion For Summary Judgment to address the -- the new cause of action in the Amended Complaint, and so Winterfox had to file the Motion For Summary Judgment that it had already spent significant time and expense and effort on addressing the causes of action in the original Complaint.

In its -- in its Memo in Opposition to the Motion To Strike -- or in his Memo in Opposition to the Motion To Strike, the Trustee gives lip service to the fact that it was not Winterfox's job to make sure that the Trustee timely filed his pleadings, but then he attempts to completely shift the burden of the responsibility and the burden of the consequences to Winterfox for his admitted inadvertence.

The Trustee states in his reply that it was incumbent upon Winterfox to call him to find out why he hadn't filed an amended complaint. Winterfox had no such duty. The Trustee cannot fault Winterfox for not advising the Trustee how to prosecute his case. Winterfox had no obligation to call the Trustee and help him sue Winterfox.

And, most significantly, there has been clear prejudice to Winterfox's result of the Trustee waiting until May 22nd to file the Amended Complaint. Facing -- facing that deadline, Winterfox did the only thing it could do; file a Motion For Summary Judgment on the pleadings that had been properly filed. If the Amended Complaint is not struck, Winterfox will be greatly prejudiced. It will have filed a Motion For Summary Judgment on the original claims in the -- in the original Complaint, and it will also be denied the right to file a Motion For Summary Judgment on the causes of action in the Amended Complaint, all through no fault of its own.

The say, as the Trustee does in his reply, that Winterfox is not prejudiced because the defense to the Utah Residential Mortgage Practices Act is still preserved for trial totally ignores the fact that Winterfox now has to incur the time, the -- the prejudice of the delay in getting all of these claim resolved and, also, the expense of going to trial, that is very real prejudice.

Even more troubling, that result actually benefits the Trustee because he gains the advantage of never having to respond to a Motion For Summary Judgment on the Utah Residential Mortgage Practices Act claim which we do believe is susceptible of being disposed of on summary judgment. The Trustee should not be allowed to work his admitted inadvertence to his advantage. Such result would not only be inequitable. It would be very unfair. The Trustee should bear the burden of his own mistakes. Not Winterfox.

The point is that Winterfox has been significantly prejudiced by the Trustee's failure to act, a failure to act for which there is no excuse. For that reason we submit that the Trustee's Amended Complaint should be struck and, in any event, the Trustee should not be allowed to obtain an advantage as a result of his own lack of due diligence in filing the Amended Complaint far enough in advance of the dispositive deadline that Winterfox would know what claims the Trustee was asserting against it.

THE COURT: All right. Thank you --

MS. BOULEY: Thank you.

THE COURT: -- Counsel.

MR. AFFLECK: Your Honor, it's true that the Trustee did not file and serve the Amended Complaint immediately after this Court authorized the filing of service of such. Winterfox claims that it is prejudiced because it justifiably assumed the Trustee would not file the Amended Complaint. A copy or a draft of the Amended Complaint was filed with the motion to amend the Complaint. In that amendment, Your Honor, the Trustee sought several things. One was to add some additional parties. These were assignees of Winterfox. It sought to remove a claim under the Utah Consumer Credit Code, and it sought to add a claim under the Utah Residential Mortgate Practices Act.

At the hearing the Court granted the motion except with respect to adding the additional parties. That part of the motion was denied. This required the Trustee to revise the draft of the Amended Complaint that was attached to the motion. The Trustee did so. We sent a copy of that draft to Winterfox's counsel and asked for their approval of the form of that Complaint to make sure that it was consistent with the judge's -- with the Court's ruling. They did respond and approved the form of that Amended Complaint. And then additionally, Your Honor, the Order that was submitted to the Court and that was signed by the Court included a copy of the Amended Complaint that was to be filed, and the Order was specific that here is the form of the Amended Complaint that is to be filed.

Now, we didn't file that right away, and it was due to inadvertence. But can there be a real claim that Winterfox did not believe, after going through all that work, that the

Trustee intended not to file the Amended Complaint? I don't think so. Winterfox went ahead and filed a Motion For Summary Judgment on a claim that the Trustee indicated to this Court the Trustee was not intending to pursue. That's the claim under the Utah -- or the Uniform Consumer Credit Code. That claim was dropped. That's one of the claims of prejudice of Winterfox; that they had to spend time drafting a Motion For Summary Judgment on a claim that the Trustee told this Court it would not prosecute and which was not included in the proposed Amended Complaint that was shared with Winterfox in which Winterfox approved as to form.

It's true that Winterfox, it's not their duty to call us up, tell us how to do our job. It's true that we inadvertently didn't file it. But practically speaking, a phone call would have been nice. A phone call to the -- something to the effect of, you know, we're filing a Motion For Summary Judgment on this UCC claim. You said you were going to dismiss it. You have an Amended Complaint. It doesn't have it. Are we wasting our time by continuing with this. And the answer would have been yes. And we would have noted earlier that we had not actually filed and served the Amended Complaint.

As to the Utah Residential Mortgate Practices Act claim, Your Honor, that was a claim that was added on the sole fact that Winterfox was not a licensed -- did not have an appropriate license to give a residential mortgage. It was an undisputed fact. I believe it's still undisputed and I think, in their reply memorandum, the only question they have with respect to our claim on that issue is whether the act applies to Winterfox or not.

THE COURT: Well, that -- wouldn't that have been a proper subject for summary judgment?

MR. AFFLECK: It could be, yes. I believe it would be, Your Honor.

THE COURT: Well, I guess I'm confused. Wouldn't -- in drafting your documents, wouldn't you have been looking for an answer?

MR. AFFLECK: Yes, Your Honor.

THE COURT: Okay. So if there's no answer, wouldn't you -- all right. Maybe you could explain that to me.

MR. AFFLECK: The fact is, Your Honor, that in reviewing the motion that was -- Mr. Millar took belaboring over in preparing the motion, Mr. Millar has not had a lot of experience preparing motions for summary judgment. When he did so and I was reviewing his work, I noted that he had listed as undisputed facts something Amended Complaint and no reference to the answer. And I explained to Mr. Millar we need to reference the answer.

I looked for it, it was not there. I discovered the reason for that is we had not filed. That's -- that is the truth and that is the nature of the inadvertence. It is -- I don't blame Mr. Millar. I blame myself for not supervising him more carefully. Mr. Millar is an experienced lawyer, but he just hasn't had a lot of experience in drafting and presenting motions for summary judgment. So that's how it was discovered, Your Honor.

Now, if Your Honor believes that it is prejudicial to Winterfox having -- to have been denied an opportunity to file a motion for summary judgment asserting that the act does not apply to it, that it is not covered by the act, I think that's a simple issue, a simple question of statutory construction. And, Your Honor, the Trustee would be willing to respond to that motion in as little as eight or ten days if the Court were to solve the prejudice on that by allowing Winterfox to file on that issue.

THE COURT: But how much time totally will that take? I mean, you have to -- a while to -- to draft their summary judgment and then your response. So doesn't that push everything back into all the dates that we have?

MR. AFFLECK: I think -- I think that could still be arranged so that it could be heard at the same time as the summary judgment motions that are on file. I don't think it is a complex issue. Does the statute cover Winterfox as a lender or doesn't it? The statute defines what lenders are covered. There is very little case law on the topic.

But, Your Honor, rather than going to the extreme of striking the Amended Complaint which is a remedy that would at least appear from the case law that's been cited, we haven't been able to find any case law where this type of prejudice -- type of prejudice that is alleged by Winterfox is resolved by simply striking a pleading. It is resolved in less drastic ways that preserves the fairness to the other side, but does not result in the matter being tried or being disposed on something other than the merits.

And in this case, Your Honor, I don't think, you know, it's hard to see -- I mean, certainly it's not Winterfox's fault that we didn't file that and serve it, but, certainly, they understood what the pleading was. They understood we intended to file it, and they went forward without so much as giving a phone call to clarify something with us. We think, Your Honor, in these circumstances, if the Court believes that the prejudice must be addressed, that it can be addressed in a less drastic way than striking the Amended Complaint. Thank you.

THE COURT: All right. Thank you, Counsel. Do you have anything further, Ms. Bouley?

MS. BOULEY: Yes. Just a couple of things, Your Honor. Your Honor, the Trustee has -- the Trustee's counsel stated that Winterfox must have known that the Trustee neglected to file the Amended Complaint. These are matters we didn't know. We can't read their mind, we don't know what they were thinking, and, as the weeks went, by no Amended Complaint was filed. As Your Honor has pointed out, there was no -- they didn't call us to find out where our answer was, which we thought that that would likely happen if they thought they had filed an Amended Complaint. They also had not received all of the relief that they had requested in their motion.

And, in addition to that, you know, we -- as I indicated earlier, we believe that the Utah Residential Mortgate Practices Act is susceptible of being disposed of on summary judgment, and we thought that perhaps they had determined that as well and decided not to proceed with their Amended Complaint.

I mean, in other words, there were a myriad of reasons as to why they might not have decided to proceed with their Amended Complaint. We really didn't know what was going on, but we did know that they hadn't filed the Amended Complaint. Clearly, they needed to do that under the Rules and pursuant to the Court's order, and we felt that calling the Trustee under those circumstances could potentially violate our duties to our client. It's not our job, and it certainly -- it actually is our job not to help the Trustee sue Winterfox. And so, you know, again, they just can't lay the blame for this error and oversight at Winterfox's feet as they're trying to do. It wasn't our responsibility, and all we can do is respond to the pleadings that are properly on file.

In terms of, you know, the prejudice to Winterfox, again, this case has -- the Trustee's actions in filing that Amended Complaint late has severely prejudiced Winterfox just in terms of delay. We've already had significant delay in this case, and if -- if we go with Trustee's counsel's suggestion that we be allowed to brief this additional claim, they be allowed to respond, et cetera, that's just going to cause additional delay.

I do want to let the Court know that I already have a family vacation scheduled for next week. I'll be gone all next week, and I'm the one who is most familiar with all of the facts and the law of this case, so I'm the one who's going to have to, if a motion -- a second Motion For Summary Judgment is going to be drafted, I'm going to need to be the one to do it. And so we would, you know, would need, I would think, several weeks in order to get that done given -- given my travel schedule. And under these circumstances where there has been severe prejudice with -- to Winterfox with no excuse, we do think that striking the Amended Complaint is appropriate under the circumstances.

In terms of, you know, what claims were asserted in the Amended Complaint, that's not at issue. The issue is not that we didn't know what they were going to assert in the Amended Complaint. The issue is we didn't know which -- which Complaint they were proceeding under, and we had to go with what was on file. They're -- they're charged with knowing the rules just as we are. Mr. Millar's lack of experience is -- is no excuse. He's an attorney, he's been admitted to practice before this Court, and they should not be allowed to rely on that to excuse them under these circumstances.

The bottom line is we, you know, we were checking the docket, and even the morning of May 22nd we were well into our Motion For Summary Judgment at that point. But even morning, afternoon of the dispositive motion deadline the only complaint on file, the only claims on file were the ones in the original Complaint, so that's what we responded to. And we think we ought to be allowed to proceed with our Motion For Summary Judgment on the original Complaint, and that the amended one ought to be struck under the circumstances so we can stay on schedule.

THE COURT: All right. Is there anything further?

MS. BOULEY: Thank you.

MR. AFFLECK: I would simply note, Your Honor, that the hearing on the Trustee's Motion For Summary Judgment that's set, if the Court allows it, is tentatively set for July 28th.

THE COURT: All right. We'll be in brief recess.

(Recess from 3:08 p.m. until 3:22 p.m.)

THE COURT: Well, I suppose -- it's just necessary to try and put this adversary proceeding not only to get it moving, but to put it in some kind of context about how long it's been pending and that it was actually scheduled for trial, which is remarkable considering where we are now after the trial was stricken.

In any event, as it relates to the motions that are pending before the Court today, one is to strike the Plaintiff's Amended Complaint. The Court granted the motion to file the Amended Complaint, but apparently, as a result of mistake, the actual Complaint was not timely filed and -- or was filed so late that there could not be a Motion For Summary Judgment filed on the amended Claims For Relief in the Complaint.

Perhaps if the parties' relationships were somewhat different, they could have picked up the phone, but I think Ms. Bouley's comment is -- is absolutely appropriate that it's not her responsibility to have the Trustee properly prosecute the case and may be contrary to her relationship with her client to remind the Trustee to file the pleadings in the case. I'm going to file -- find that there is -- we have a deadline in this case that is ancient and should have been tried by now. And, frankly, it looks to me like the only reasons that it didn't go to trial is because it was impossible to proceed in the case where Judge Clark had simply thrown up his hands because the parties couldn't get together sufficient to produce a pre-trial order in the case.

In any event, I think that there's actual prejudice to the Defendant of not having the Amended Complaint on file. If I allowed the Amended Complaint to -- or deny the Motion To Strike, we would have to extend the scheduling, and I'm simply not going to do that in this case. Therefore, I'm going to grant the Motion To Strike the Plaintiff's Amended Complaint.

Now, as it relates to the untimely filing of the Motion For Summary Judgment, I think that Mr. Jubber's comments regarding the characterization of Mr. Millar's declaration is appropriate. The case was set to go to trial, yet we didn't have enough information from Mr. and Mrs. Kitts to know what was going on in the case. So we finally get down to the very deadline in order to file their declarations, what Counsel has drafted isn't correct, and so we're up against a midnight deadline, even though the documents were available at the end of April.

However, that said, I can't find that failure to properly prosecute constitutes bad faith, and it was filed less than 24 hours, so I can't see that there is any prejudice to the Defendant in this motion. Therefore, I'm going to grant the extension for the deadline for filing the dispositive motion, but the claims that we go forward on are the claims in the first Complaint except to the extent that when there is a responsive pleading filed in the Motion For Summary Judgment, if the Estate doesn't intend to prosecute the UCC claim, then there ought to be determination made in that responsive pleading that it is no longer at issue. I'm going to require an Amended Complaint that eliminates it. If you're not going forward with it, then you should say so.

I'm going to set both of the matters for -- the motions for summary judgment for hearing on July 28th. And I can't see on the docket there are any notices of hearing that have gone out yet. I think this was originally calendared, perhaps, sometime in the afternoon. I'm going to move it forward until 8:00 o'clock. So both matters will be heard on July 28th at 8:00 o'clock.

All right. Would you prepare respective Orders in the case.

MS. BOULEY: Yes, Your Honor.

THE COURT: We'll be in recess.

(Proceedings concluded at 3:27 p.m.)

* * * * *

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

REPORTER'S CERTIFICATE

I, Amanda Richards, court approved transcriber, certify that;

The foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Amanda Richards 2/16/10

Amanda Richards, CSR Date